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Erik B. Thueson
University of Montana School of Law

ATTORNEY FEES: SLIPPING FROM THE AMERICAN RULE STRAIT JACKET

Erik B. Thueson

I. INTRODUCTION

Absent statute or enforceable contract to the contrary, American litigants pay their attorneys' fees.[1] This rule is contrary to the English rule, prevalent in most foreign jurisdictions, which assesses both parties' fees against the losing litigant. It is woodenly applied in virtually all American jurisdictions,[2] primarily on the justification that legitimate resort to the court system would be discouraged if the litigant was confronted with the specter of paying his opponent's fees as well as his own.[3] Litigants should not overlook, however, that both the legislatures and the courts have created exceptions to the general rule in certain situations where strict application would create injustice or would deter honest litigation rather than encourage it. This article reviews the court-created exceptions and discusses their application and prospects for adoption in Montana.

II. AN OVERVIEW OF THE LAW

Although the extent to which it is applied varies from jurisdiction to jurisdiction, the equitable power to shift the burden of attorneys' fees to other litigants is recognized by virtually all courts. Rather than expressing a general equity power, however, the courts have limited these exceptions to the general rule to certain categories of cases where they can fashion judicially manageable limits. But the law involving these categories has not been static. The courts continually have added exceptions and experimented with the limits of existing concepts.

The Montana supreme court strictly has adhered to the American rule[4] and has allowed fee-shifting only in isolated instances.

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1. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1974); Vincent v. Hughes Air West, Inc., 557 F.2d 759 (9th Cir. 1977); Serrano v. Priest, 414 Cal. Rptr. 315, 569 P.2d 1303 (1977); Nikles v. Barnes, 153 Mont. 113, 454 P.2d 608 (1969).

2. Alaska allows attorneys' fees as an item of costs which is to be awarded the prevailing litigant as a matter of course. Alaska Civ. Rule 82(a) (reasonable fees determined as a percentage of the recovery).

3. *See, e.g.*, Farmer v. Arabian American Oil Co., 379 U.S. 227, 236 (1969) (Goldbert, J., concurring). Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CAL. L. REV. 792 (1966); Kuezel, *The Attorney Fee: Why Not a Cost of Litigation?* 49 IOWA L. REV. 75 (1963); Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?* 20 VAND. L. REV. 1216 (1967).

4. *See, e.g.*, Bitney v. School Dist. No. 44, 167 Mont. 129, 535 P.2d 1273 (1975); Rose-

There are some recent indications, however, that the court may be amenable to adopting a broader approach.

Seven categories of exceptions to the American rule are discussed in this comment. Only three of these categories, however, are bona fide exceptions in the sense that the costs of fees are shifted to the losing litigant and are expenses directly associated with the conduct of the litigation. These are: the "bad faith exception," in which fees are awarded against a party who has acted in bad faith during the course of the litigation; the "private attorney general exception," in which the loser is assessed both parties' fees because his opponent has vindicated an important social policy; and the "exemplary damages exception," in which fees are considered an element of punitive damages. In two other exceptions, the "common fund" and "substantial benefit" doctrines, the attorneys' fees are shared by all persons benefiting from the litigation rather than assessed against the loser. In the remaining two categories, the "compensatory damages" and "prior litigation" exceptions, the attorney' fees are actually compensatory damages rather than litigation expenses.

A. *Common Fund Doctrine*

When a person through active litigation creates reserves or increases a fund, others sharing in the fund must bear a portion of the litigation costs including reasonable attorneys' fees.[5] The fees can be collected either from the fund itself or from those enjoying its benefits.[6] As such, they are not awarded against the losing party, but are apportioned *pro tanto* against all who benefit from the litigation.

The scope of the doctrine has evolved over the years. Early in its development, the courts recognized that the attorney had an

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neau Foods, Inc. v. Coleman, 140 Mont. 572, 374 P.2d 87 (1962); Tomten v. Thomas, 125 Mont. 159, 232 P.2d 723 (1955).

5. *See* Trustee v. Greenough, 105 U.S. 527 (1881). In this leading decision, a bondholder, through expensive litigation, managed to save a large amount of security pledged for paying interest on the bonds. This created a fund in which other bondholders shared. The United States Supreme Court held that a court has discretion to use equitable power to allow reimbursement of the successful litigant "either out of the fund itself or by proportional contribution from those who accept the benefit of his efforts." *Id.* at 533.

For recent Ninth Circuit decisions, *See* City of Klawock v. Gustafson, 585 F.2d 428 (9th Cir. 1978); Vincent v. Hughes Air West, Inc., 557 F.2d 759 (9th Cir. 1977).

The doctrine has been recognized in Montana for over half a century. *See* Tuttle v. Argonaut Ins. Co., ___ Mont. ___, 580 P.2d 1379 (1978); Hardware Mut'l Cas. Co. v. Buttler, 116 Mont. 73, 148 P.2d 563 (1944); *In re* Baxter's Estate, 94 Mont. 257, 22 P.2d 182 (1933).

6. *See* Trustee v. Greenough, 105 U.S. 527, 533 (1881); State *ex rel.* Lewis and Clark County v. Dist. Court, 90 Mont. 213, 224, 300 P. 544, 548 (1931).

independent right, reinforceable by lien, to share in the entire fund, although his client was only entitled to part of it.[7] "The lawyer was suddenly thought of as producer of this wealth, though he did nothing more than perform his contract with his own client."[8] Additionally, the beneficiaries of the fund need not be parties to the proceedings at all. "A fund may exist simply because a prior ruling will by *stare decisis*, determine future cases."[9] On the other hand, the court will not shift attorney fees where the lawyer merely represents an adverse interest in the fund and his efforts only redistribute the assets rather than protect or preserve them. Thus, where an attorney's efforts merely establish which of conflicting claimants are entitled to share in a decedent's estate, no fee will be awarded.[10]

The concept is well-settled in virtually all American jurisdictions, including the federal courts and Montana.[11] It is frequently applied in class action situations where the litigation results in an easily calculable sum.[12]

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7. *See, e.g.*, Central R.R. & Banking Co. v. Pettus, 113 U.S. 116 (1885); *accord*, Vincent v. Hughes Air West, Inc., 557 F.2d 759 (9th Cir.1977); *In re* Baxter's Estate, 94 Mont. 257, 22 P.2d 182 (1933).

8. Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597, 1603-04 (1974).

9. Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939) is often cited for this proposition. The plaintiff successfully established her own rights in a trust, but had not brought her action as a class suit. The rights of other beneficiaries, therefore, were not established. The litigation, through *stare decisis*, however, determined the outcome of future cases.

In the federal courts, district court judgments do not necessarily have the effect of *stare decisis*. City of Klawock v. Gustafson, 585 F.2d 428 (9th Cir. 1978).

See generally Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597, 1609-11 (1974).

10. Hamilton's Estate v. Farguhar, 96 Mont. 551, 33 P.2d 258 (1934); *accord*, Gabrielson v. City of Long Beach, 56 Cal. 2d 224, 363 P.2d 883, 14 Cal. Rptr. 651 (1961).

11. *See* note 5, *supra*.

12. State *ex rel.* Lewis and Clark County v. Dist. Court, 90 Mont. 213, 300 P. 544 (1931) illustrates the class action situation. Bank depositors brought an action for themselves and all others similarly situated to annul proceedings for capital stock reduction. The reduction had reduced the amount available to creditors after the bank became insolvent. The depositor successfully annulled the proceeding resulting in the creation of a fund available to all bank creditors. The court held that since the action had been maintained by the depositors at considerable expense, the necessary expense, including a reasonable attorney's fee should be fixed by the court and paid to the plaintiffs. The court reasoned that to hold otherwise "would be wholly unconscionable." It would allow the great mass of creditors to "share in the feast at the expense of the hunter who got the game." *Id.* at 224, 300 P. at 548. *See also* Annot., 38 A.L.R.3d 1384 (1971). The following recent cases represent other situations where the "common fund" doctrine has been applied. City of Klawock v. Gustafson, 585 F.2d 428 (9th Cir. 1978) (after litigation resulted in defendant trustee deeding vacant lots over to the city beneficiary in accordance with federal statute, the court held the city's attorneys had an equitable claim to a reasonable fee, and the vacant lots constituted a common fund to which they could look for payment); Tuttle v. Argonaut Ins. Co., ___ Mont. ___, 580 P.2d 1379 (1978) (workers' compensation insurer was not allowed to share in the settlement achieved by insured's litigation against tortfeasor until proportional attorney fees were paid; court noted that this requirement is now statutory for workers' compensation cases); Agee v. Trus-

B. *Substantial Benefit Doctrine*

Attorney fees can be awarded "when a litigant, proceeding in a representative capacity, obtains a decision resulting in the conferral of a 'substantial benefit' of a pecuniary or nonpecuniary nature."[13] The concept is actually an extension of the "common fund" doctrine rather than an independent theory for allowing fee-shifting. Similar to the "common fund" doctrine, it is based on the equitable consideration that those receiving the benefit should contribute to the cost of producing it.[14] Unlike the "common benefit" doctrine, however, there is no necessity for the court to be in possession of a fund or for the benefit to be pecuniary in nature.

A common application is the stockholders' derivative suit. For instance, in the seminal California case, shareholders gained a settlement assuring a beneficial change in corporate management and the arbitration of certain claims which could result in future monetary awards. Although the action created no specific fund, the court shifted the cost of fees from the shareholders who brought the suit to the corporation which would ultimately benefit.[15]

The several types of situations in which the substantial benefit doctrine has been applied exhibit its expansion. For example, in *Hall v. Cole*[16] the United States Supreme Court applied a variation of the doctrine when a labor union member brought suit against his union for attempting to suppress his speech. Since vindication of the former member's rights also substantially benefited the union and all of its members, reimbursement of attorney fees from the union's treasury merely shifted the costs of litigation to the "class that [had] benefited from them."[17]

The concept is also applicable in suits against the government.

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tees of Pension Bd., 33 Colo. App. 268, 518 P.2d 301 (1974) (firemen who successfully prevented pension board from wrongfully paying pensions were entitled to fees for protecting the pension fund — especially since the litigants received no direct personal benefit from prosecuting the action); Grein v. Cavano, 61 Wash. 2d 498, 379 P.2d 209 (1963) (union members who successfully forced an accounting of union funds were entitled to attorney fees for benefiting the fund). *See also* Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597 (1974).

13. Serrano v. Priest, 20 Cal. 3d 25, 569 P.2d 1303, 1309, 141 Cal. Rptr. 315, 321 (1977). *See also* Vincent v. Hughes Air West, Inc., 557 F.2d 759 (9th Cir. 1977).

14. *Id.*

15. Fletcher v. A.J. Industries, 266 Cal. App. 2d 313, 72 Cal. Rptr. 146 (1968).

16. 412 U.S. 1 (1973). The plaintiff, after introducing several resolutions alleging instances of union officials' misconduct, was expelled from the union. He claimed in his suit that his right of free speech, as protected by the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 412 (1976), had been violated.

17. *Id.* at 8-9. *See also* Mills v. Electric Auto Lite Co., 396 U.S. 375 (1970) (stockholder derivative action setting aside merger resulted in a substantial benefit to an ascertainable class — other shareholders of the corporation).

In *Mandel v. Hodges*,[18] a California court of appeal awarded attorney fees to a state employee who successfully challenged the state's practice of giving employees time off with pay on Good Friday. In holding that the practice violated the constitutional prohibition against the establishment of religion, the court found that a substantial benefit accrued to the state in the form of future savings of funds formerly expended for work not performed.

Ordinarily, the benefits accrue to an identifiable class such as a labor union, corporation, or government entity, but in *Weiss v. Bruno*,[19] the Washington Supreme Court extended the theory to even broader classifications. A litigant who successfully blocked the expenditure of public funds made pursuant to patently unconstitutional legislation was awarded attorney fees because the action benefited "all *citizens* and *taxpayers* by halting the disbursement of public funds."[20] The Montana Supreme Court has not directly ruled on the applicability of the "substantial benefit" theory. Acceptance of the concept by the United States Supreme Court,[21] the Court of Appeals for the Ninth Circuit,[22] and sister states,[23] however, provides important precedent. Additionally, in an early case the court did recognize the concept, although it did not apply it,[24] and it has held that there is "no reason why the power of the court to allow an attorney fee should be made to depend upon the mere possession of [a] trust fund."[25] Finally, there is an additional important social policy for adopting the doctrine, since without some form of fee-shifting, large organizations can act oppressively toward their members or constituency, knowing that their opposition will lack sufficient financial resources to fight back.

C. *Private Attorney General Concept*

Attorney fees may be awarded a litigant who successfully vindicates an important public policy if (1) the necessary costs of securing the result transcend the individual plaintiff's pecuniary interest to an extent requiring subsidization, and (2) a substantial number of persons stand to benefit from the decision.[26] At first blush, the

18. 54 Cal. App. 3d 596, 127 Cal. Rptr. 244 (1976).

19. 83 Wash. 2d 911, 523 P.2d 915 (1974).

20. *Id.* at 914, 523 P.2d at 917 (emphasis in original).

21. Hall v. Cole, 412 U.S. 1 (1973); Mills v. Electric Auto Lite Co., 396 U.S. 375 (1970).

22. Vincent v. Hughes Air West, 557 F.2d 759, 768 n. 7 (9th Cir. 1977) (recognizing doctrine, but believing it should only apply where (1) the benefit is non-pecuniary, and (2) the litigation involves interests of broad public importance).

23. Serrano v. Priest, 20 Cal. 3d 25, 569 P.2d 1303, 1309, 141 Cal. Rptr. 315, 321 (1977); Weiss v. Bruno, 83 Wash. 2d 911, 523 P.2d 915 (1974).

24. MacGinniss v. Boston and Mont. Copper Co., 29 Mont. 397, 75 P. 89 (1904).

25. *Id.*

26. Serrano v. Priest, 20 Cal. 3d 25, 569 P.2d 1303, 1314, 141 Cal. Rptr. 315, 326 (1977).

concept appears to be a further extension of the "common fund" doctrine, but it is premised on wholly different grounds. It is applied solely to encourage suits effectuating important public policies when the litigation would otherwise be financially impractical or impossible.[27] The court need not consider whether or not an identifiable class will ultimately share the financial burden of the litigation. Nor is it necessary to identify an actual or concrete benefit. It is sufficient that a constitutional or important statutory policy is redeemed.[28]

The concept can provide needed assistance in two areas of litigation. First, it certainly deserves recognition in financing public interest suits. Complex issues and time-consuming, costly discovery and presentation often limit the availability of representation by private attorneys acting *pro bono publico*. Thus, as it stands now, private and sometimes government entities can be lax with the public's interests and can discount the possibility of a lawsuit because of the public's inability to mount or follow through with an effective opposition. The court's exercise of equitable power to award attorneys' fees to successful public interest litigants would provide a means by which private citizens could surmount the financial obstacles which now block litigation in the public interest.[29]

The concept also deserves attention in suits involving important public policies brought on behalf of persons of moderate finanacial means. Representation for this type of litigant is often unavailable because a *res* adequate to pay an attorney through a contingency fee arrangement is not generated. For instance, a citizen who has his right of privacy violated will find that an inability to afford attorney fees gives him a right without a remedy. The American rule for allocating attorneys' fees under these circumstances loses all justification since both the individual and society in general suffer when constitutional rights go unvindicated. The tendency of the rule to block access to the courts makes it an instrument of oppression. Exercising equity power to assure the members of the bar that they can be compensated for their efforts — at least in conflicts of constitutional significance — would provide the practical incentive

Accord, Application of Portland Gen. Elec. Co., 25 Or. App. 469, 550 P.2d 465 (1976); Crane Towing, Inc. v. Gorton, 89 Wash.2d 161, 570 P.2d 428 (1977) (recognizing but not applying theory); Deras v. Myers, 272 Or. 57, 535 P.2d 541 (1975). *Contra*, Alyeska Pipeline Service Co. v. The Wilderness Society, 421 U.S. 240 (1974); Providence Journal Co. v. Mason, 416 R.I. 614, 359 A.2d 682 (1976) (following reasoning of Alyeska).

27. Serrano v. Priest, 20 Cal. 3d 25, 569 P.2d 1303, 1312, 141 Cal. Rptr. 315, 325 (1977); *see* Notes, *Awarding Attorneys' Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest*, 24 HASTINGS L.J. 733 (1973).

28. Serrano v. Priest, 20 Cal. 3d 25, 569 P.2d 1303, 1312, 141 Cal. Rptr. 315, 325 (1977).

29. The arguments for the concept are summarized in *id.*, 569 P.2d at 1313, 141 Cal. Rptr. at 1315.

for the vigilance necessary to safeguard these important interests.[30]

The "private attorney general" concept has developed in the federal courts within the past decade. By 1974, all but one circuit recognized its application.[31] Unfortunately, in *Alyeska Pipeline Service Co. v. Wilderness Society*,[32] the United States Supreme Court halted use of the doctrine in the federal courts — at least in litigation concerning federal questions.[33] The Court gave two primary reasons. First, the Court interpreted an 1853 court costs statute[34] as indicating a Congressional intent to preempt the field and exlude attorneys' fee awards except in cases where a statutory grant had been given.[35] Secondly, the Court believed that the making of such awards absent statutory grant would leave the courts "free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party . . . or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases."[36]

The *Alyeska* holding should not foreclose use of the doctrine in state courts, however. The first case recognizing this distinction was

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30. Most of the federal litigation concerned this type of situation. *See* Fowler v. Schwarzwalder, 498 F.2d 143 (8th Cir. 1974) (action to enjoin discriminatory hiring practices where the statute did not have express authorization for attorney fees); Hoitt v. Vitek, 495 F.2d 219 (1st Cir. 1974) (prison inmates successfully enjoin deprivation of constitutional right by prison officials); Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974) (vindication of the federally protected right of interstate travel free from the forfeiture of welfare benefits). In Knight v. Auciello, 453 F.2d 852 (1st Cir. 1972), the plaintiffs sued for unlawful discrimination in refusing to lease an apartment. They were awarded damages, but the trial court refused to award attorney fees. In reversing the trial court on fees, the court of appeals summarized the rationale for the "private attorney general" concept in this situation:

> The violation of an important public policy may involve little by way of actual damages, so far as a single individual is concerned, or little in comparison with the cost of vindication, as the case at bar illustrates. If a defendant may feel that the cost of litigation, and particularly, that the financial circumstances of an injured party may mean that the chances of suit being brought, or continued in the face of opposition, will be small, there will be little brake upon deliberate wrongdoing. In such instances public policy may remove the burden from the shoulder of the plaintiff seeking to vindicate the public right.

Id. at 853.

31. *See* Notes, *Awarding Attorneys' Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest*, 24 HASTINGS L.J. 733 (1973).

32. 421 U.S. 240 (1974).

33. State law on attorney fees awards apparently will control in diversity suits. *Id.* at 259 n. 31.

34. 28 U.S.C. § 1923 (1976).

35. 421 U.S. at 269.

36. *Id.* It should be mentioned that in 1976 Congress passed the Civil Rights Attorney's Fee Award Act, 42 U.S.C. § 1981 (1976), which restored pre-*Alyeska* law to cases arising under civil rights laws. *See* Stanford Daily v. Zurcher, 550 F.2d 464 (9th Cir. 1977).

Serrano v. Priest.[37] In this California decision, a citizens' group successfully challenged the constitutionality of the then-existing California public school financing system. The plaintiffs' attorneys requested an award of reasonable attorneys' fees against the defendants (state of California officials) based on the equitable powers of the court. After holding the "common fund" and "substantial benefit" concepts inapplicable, the court addressed the "private attorney general" theory. Concerning the *Alyeska* holding that Congress had indicated an intent to preempt the field, the court noted that the 1853 federal statute relied upon had no counterpart at the state level. Moreover, it noted language in *Aleyska*, recognizing that "the fashioning of equitable exceptions to the statutory rule to be applied in [the states] is a matter within the sole competence of the [state] court."[38] However, the court found the second basis of *Alyeska*, dealing with the manageability and fairness of such awards absent legislative guidance, to be directly in issue. It conceded that thrusting the judge "into the rule of making assessments of the relative strength or weakness of public policies . . . would [give him a role] closely approaching that of the legislative function,"[39] but it ruled that this difficulty was not present where, as in the case before it, the public policy had *constitutional* rather than statutory underpinnings. The award of attorney fees was therefore justified since the plaintiffs had vindicated a constitutional policy which benefited the citizens of the state, and the nature of the litigation was such that subsidization was justified in the event of victory.

Similar to California, Oregon has recognized the applicability of the private attorney general concept in situations involving the protection of constitutional rights.[40] Additionally, Michigan has in-

37. 20 Cal. 3d 25, 569 P.2d 1303, 141 Cal. Rptr. 315 (1977).

38. 569 P.2d at 1313, 141 Cal. Rptr. at 324; *see* Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 259 (1975).

39. 141 Cal. Rptr. at 325, 569 P.2d 1314.

40. Application of Portland Gen. Elec. Co., 25 Or. App. 469, 550 P.2d 465 (1976); Deras v. Myers, 272 Or. 47, 535 P.2d 541 (1975). In *Deras* a candidate for state representative successfully obtained declaratory relief that state statutes limiting funds which could be spent on political campaigns were unconstitutional. The court said that "the plaintiff . . . should not be required to bear the entire cost of this litigation the benefits of which flow equally to all members of the public." *Id.* at 66, 535 P.2d at 550. The absence of an identifiable benefited class and cost-spreading element indicates that the court implicitly recognized the "private attorney general" concept although it did not refer to it by name. In Application of Portland Gen. Elec. Co., the court stated that the *Deras* approach should only be employed in cases of constitutional significance.

Apparently only one state has denied attorney fees on the basis of *Alyeska*. In Providence Journal Co. v. Mason, 416 R.I. 614, 359 A.2d 682 (1976), the court held that the legislature had indicated an intent to occupy the field. The case is distinguishable on the basis of the right involved; it was based on statutory policy, rather than constitutional policy as were the California and Oregon cases. It could be argued that allowance of attorney fees in some state

corporated the concept into some of its statutes,[41] as has California subsequent to the *Serrano* decision.[42] The American Bar Association also supports fee-shifting in this type of situation.[43]

The Montana court has not yet addressed this new equitable concept. As discussed above, important policy grounds support its adoption, and would be especially significant in Montana where the constitution creates several substantive rights including "the right to a clean and healthful environment" and an express right of privacy.[44]

D. *Bad Faith Concept*

Attorneys' fees may be awarded the prevailing party where his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons during the course of the litigation.[45] The award generally is regarded as punitive and therefore will be considered only in extraordinary circumstances where there is proved "bad faith."[46] The existence of bad faith will not easily be concluded, and it is generally only when the loser has "contumaciously deprived a [person] of his clear legal entitlement, forcing the latter into the

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statutes and not in others indicates a legislative intent to occupy the field. State statutes, however, generally do not carefully regulate the remedy in detail when they create a substantive right as federal statutes ordinarily do. Thus whether or not attorney fees should be allowed is strictly a matter of statutory construction. *See* DOBBS, HANDBOOK ON THE LAW OF REMEDIES 199 (1973).

41. MICH. STAT. ANN. § 3.548(802) (1978) provides that in certain civil rights actions the court may award attorney fees.

42. CAL. CIV. PROC. CODE § 1021.5 (West).

43. The ABA supports the principle that reasonable attorney fees be included as costs recoverable by prevailing parties in more categories of civil litigation than present rules permit. The organization has urged Congress to enact legislation to permit courts and administrative agencies to award fees from public funds when a private party substantially prevails against the government if (1) substantial public benefit or important public rights are vindicated and (2) the economic interest of the party is small. *See* Williams, *Fee Shifting and Public Interest Litigation*, 64 A.B.A.J. 862 (1978).

44. MONT. CONST. art. II, §§ 3 and 10 (privacy).

45. Hall v. Cole, 412 U.S. 1, 5 (1973). The concept apparently originated in the federal courts. *See* F.D. Rich Co. v. Industrial Lumber Co., Inc., 417 U.S. 116 (1974) (indicating that this is a long recognized inherent power of the courts); Vaughan v. Atkinson, 369 U.S. 527 (1962). It has gained acceptance in the state courts, however. *See, e.g.*, Christian v. American Home Assur. Co., 577 P.2d 899 (Okla. 1978); Young v. Redman, 55 Cal. App. 3d 827, 128 Cal. Rptr. 86 (1976). Some states now have statutes addressing this area. *See* Sinder v. Stevens Kokes, Inc., ___ Md. ___, 384 A.2d 463 (1978) (applying Md. Rule 604b where plaintiffs bring suit to harrass homebuilders); Southern Bell Tel. & Tel. Co. v. C & S Realty, 141 Ga. 216, 233 S.E.2d 9 (1977) (under GA. CODE § 20-1404 jury may award damages where a party has acted in bad faith or stubbornly litigious). *See* Annot., 31 A.L.R. Fed. 833 (1977).

46. Hall v. Cole, 412 U.S. 1, 5 (1973); Cordeco Development Corp. v. Santiago Vasquez, 539 F.2d 256 (1st Cir. 1976); Feist v. Luzerne County Bd. of Assessment, 22 Pa. Commw. Ct. 181, 347 A.2d 772, 781 (1975) ("the key factor . . . must be the proven bad faith of the offending party").

expense of rescuing himself through legal action," that attorney fees will be awarded.[47]

Vaughan v. Atkinson[48] is often cited to illustrate the concept. A seaman brought an admiralty suit against a shipowner to recover damages for failing to pay maintenance and medical costs associated with suspected tuberculosis. The defendants had been "callous in their attitude," making no investigation of the plaintiff's claim.[49] As a result, the seaman was forced to hire a lawyer and go to court to recover what was "plainly" owed to him. The high court held that the shipowner's "willful and persistent" default merited fee-shifting.[50]

The requisite bad faith can occur in conduct leading to the lawsuit or during the lawsuit itself. For instance, acceptance of the concept has been triggered where conduct prior to the lawsuit involved "gross and willful" fraud,[51] where a corporation's oppressive conduct substantially harmed another corporation through unfair competition,[52] and where a labor union intentionally breached a fiduciary duty owed a non-member.[53] Examples of conduct within the lawsuit itself which have resulted in fee-shifting include the filing of an unwarranted motion to hold an opponent in contempt for failing to obey a court order,[54] the vexatious seeking of a preliminary injunction without cause,[55] and the use of dilatory actions designed to protract litigation until the plaintiff is worn to financial exhaustion.[56]

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47. County of Inyo v. City of Los Angeles, 78 Cal. App. 3d 82, 144 Cal. Rptr. 71 (1978). *Accord*, Vaughan v. Atkinson, 369 U.S. 527 (1962).

48. 369 U.S. 527 (1962).

49. *Id.* at 530.

50. *Id.* at 531.

51. Schlein v. Smith, 82 App.D.C. 42, 160 F.2d 22 (1947). The defendants swindled an elderly woman out of her residential real property through a series of usurious transactions.

52. Sperry Rand Corp. v. Electric Concept, Inc., 325 F. Supp. 1209, *vacated on other grounds*, 447 F.2d 1387 (4th Cir. 1970), *cert. den.* 405 U.S. 1017 (1970).

53. Richardson v. Comm. Workers of America, 530 F.2d 126 (8th Cir. 1976), *cert. denied*, 429 U.S. 824 (1977). The union intentionally breached its collective bargaining agreement and wrongfully attempted to induce the plaintiff's discharge from employment.

54. *E.g.*, Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1974), *citing* Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 426-428 (1923); Wisconsin Ave. Ass. Inc. v. 2720 Wisc. Ave. Coop. Ass., Inc., 385 A.2d 20 (D.C. App. 1978).

55. *In re* Boston & Providence R.R. Corp., 501 F.2d 545 (1st Cir. 1974).

56. Hall v. Cole, 412 U.S. 1, 15 (1972). "The dilatory action of the union and its officers . . . "which contributed to nine years of delay before the plaintiff union member could finally vindicate his rights justified fee-shifting as a punitive measure. A similar situation existed in Christian v. American Home Assur. Co., 577 P.2d 899 (Okla. 1978). The insured was forced to sue for disability benefits when the insurer denied liability. It became apparent during the trial that the defendant never had a defense to the plaintiff's claim, but was merely trying to force him into an unjustified settlement. The plaintiff was entitled to attorney fees if on remand the trial court found "bad faith" on the part of the insurer.

The grounds for adhering to the American rule in this situation are not compelling. One of the primary justifications for requiring litigants to pay their attorney fees is the fear that the risk of incurring an opponent's unknown fees will discourage honest litigation. This justification disappears where the losing party has pursued an obviously spurious claim or defense.[57]

The bad faith concept is recognized in the federal courts and is gaining recognition in state courts. The Montana court apparently recognized it in *Home Ins. Co. v. Pinski Bros.*[58] In this case, Home Insurance Company paid a hospital for damages sustained when a water boiler exploded. The insurance company then attempted to become subrogated to the hospital's right to sue the architects who designed the boiler. The architects' insurance company, an admitted wholly owned subsidiary of Home, refused to defend against its parent corporation. The trial court ultimately granted the architects summary judgment and awarded attorneys' fees. On appeal, the supreme court held that "[n]o right of subrogation can arise in favor of an insurer against its own insured."[59] As to the attorneys' fee award, the court said:

> Home has been the moving party throughout this litigation and the party whose wrongful acts made it necessary for the architects to defend themselves . . . . Under such circumstances the wrongful acts of the insurer (1) in suing its insured under its nonexistent subrogation rights . . . and (2) its refusal to defend this action . . . constituted breaches of its obligation and duty rendering the insurer liable for damages by way of attorney fees, expenses, and court costs occasioned thereby.[60]

Thus the court appears to have recognized that "bad faith" conduct in the lawsuit itself can merit an attorney's fee award.

E. *Compensatory Damages*

Attorneys' fees can be awarded a prevailing litigant if incurred as a foreseeable consequence of the wrongful act rather than as a result solely of the litigation itself.[61] The fees are actually true compensatory damages rather than litigation costs. Included within the scope of the rule are attorney fees incurred attempting to mitigate damages,[62] and fees incurred while preparing to accept the fruits of

57. *See* DOBBS, HANDBOOK ON REMEDIES 198 (1973).
58. 160 Mont. 219, 500 P.2d 945 (1972).
59. *Id.* at 226, 500 P.2d at 449.
60. *Id.* at 227-28, 500 P.2d at 950.
61. Goggins v. Wright, 22 Ariz. App. 217, 526 P.2d 741 (1974) (fees connected with quashing an invalid writ of execution); Davis v. Nat'l Pioneer Ins. Co., 515 P.2d 580 (Okla. App. 1973).
62. First Nat'l Bank v. Williams, 62 Kan. 431, 63 P. 744 (1901).

a contract (such as fees incurred by a purchaser hiring an attorney to examine land title, and the seller breaches the contract).

The Montana court recognized this concept in *Smith v. Fergus County*.[63] The plaintiff successfully sued the defendant county for breach of its real estate lease agreement. The court ruled that the plaintiff was entitled to recover attorneys' fees incurred while "attempting to get possession of the land covered by his contract" *prior to the litigation*. The fees were considered "an element of compensatory damages . . . to be treated as one of the legal consequences of the original wrong."[64]

Additionally, a small minority of jurisdictions have allowed litigation costs to be considered an item of compensatory damages when the case merits the imposition of punitive damages,[65] but Montana has not addressed this issue.

F. *Prior Litigation with Third Parties*

Attorneys' fees can be awarded when, as a foreseeable consequence of the defendant's wrongful acts, the plaintiff is involved in litigation with third parties.[66] Three elements are necessary: (1) the defendant must have committed a wrongful act or omission; (2) the act must expose and involve the plaintiff in litigation with a third party; and (3) the third party must be a stranger to the initial wrongful act or omission.[67] The original wrong may be a contract violation or tortious act.[68]

The concept is actually a particular application of the compensatory damages exception.[69] A fairly common application arises where an insurer has failed to defend its insured in an action brought by a third party. In a subsequent action for breach of contract in failing to defend, the insured may recover attorney fees expended in defending the previous suit.[70]

A unique application arose in California. The police arrested the plaintiff for possessing a stolen handgun. The plaintiff subsequently brought an action for breach of warranty of title against the

63. 98 Mont. 377, 39 P.2d 193 (1934).

64. *Id.* at 384, 39 P.2d at 195.

65. *See, e.g.*, Davis v. Tunison, 168 Ohio St. 471, 155 N.E.2d 904 (1959).

66. Chris/Rob Rlty. v. Chrysler Rlty. Corp., ___ Minn. ___, 260 N.W.2d 456 (1978); Sigman v. Stevens-Norton, Inc., 70 Wash. 915, 425 P.2d 891 (1967); Wilshire Oil Co. v. Riffe, 409 F.2d 1277 (10th Cir. 1969) (recognizing the Oklahoma rule).

67. Stolz v. McKowen, 14 Wash. App. 808, 545 P.2d 584 (1976). *Accord*, McNeil v. Allen, 35 Col. App. 317, 534 P.2d 813 (1975).

68. *See, e.g.*, Safeway Rentals & Sales Co., v. Albina Engine, Inc., 343 F.2d 129 (10th Cir. 1972); Chris/Rob Rlty. v. Chrysler Rlty. Corp., ___ Minn. ___, 260 N.W.2d 456 (1978).

69. *See* section II(E), *supra*.

70. *See* Freed v. Travelers Ins., 300 F.2d 395 (7th Cir. 1962); Annot., 4 A.L.R.3d 270 (1965).

dealer who sold him the gun. He was allowed to recover attorney fees incurred in extricating himself from the criminal charges.[71]

In Montana, *Smith v. Fergus County*,[72] which recognized attorney fees as an element of compensatory damages, should provide authority for this variation of the concept. Additionally, the *Home Ins. Co.* case, although factually distinguishable, provides authority that a "refusal to defend on behalf of . . . [the insured], constitutes [breach] of . . . duty, rendering the insurer liable for damages by way of attorney fees."[73]

G. *Exemplary Damages*

A slight majority of the jurisdictions that have considered the question have held that attorney fees may be awarded as an item of damages in cases meriting exemplary damages.[74] Most courts consider the award an item of exemplary damages, but at least one court holds that it is an item of compensatory damages.[75] Two rationales have been advanced for allowing fee-shifting in this situation. One jurisdiction, Connecticut, holds that punitive awards are "punitive" in name only and are actually imposed to cover litigation costs.[76] Other jurisdictions allow the award on the basis that a punitive award also serves a compensatory purpose, including compensation for costs subsequently incurred in the litigation.[77] Courts refusing to recognize the concept consider punitive awards appropriate only for punishment and example purposes.[78]

The Montana court probably would not accept this concept, since the court has never recognized a compensatory purpose in punitive awards.[79] The policy argument could be made, however, that a plaintiff should be encouraged to bring his dispute to court since an element of the punitive award is "[t]he public good in the restraint of others from wrongdoing."[80] Decreasing the plaintiff's financial burden by shifting attorney fees to the wrongdoer certainly would further this goal.

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71. DeLaHoya v. Slim's Gun Shop, 80 Cal. App. 3d Supp. 8, 146 Cal. Rptr. 68 (1978).
72. 98 Mont. 377, 39 P.2d 193 (1934). *See* section II(E), *supra*.
73. 160 Mont. at 228, 500 P.2d at 950.
74. *See* Annot. 30 A.L.R.3d 1443 (1970).
75. Davis v. Tunison, 168 Ohio St. 471, 155 N.E.2d 904 (1959).
76. Triangle Sheet Metal Works, Inc. v. Silver, 154 Conn. 116, 222 A.2d 220 (1966).
77. *See, e.g.*, Cox v. Stolworthy, 94 Idaho 683, 496 P.2d 682 (1972); Brewer v. Home Stake Production Co., 200 Kan. 96, 434 P.2d 823 (1967).
78. *See* Annot., 30 A.L.R.3d 1443 (1970).
79. Ramsbacher v. Hohman, 80 Mont. 480, 489, 261 P. 273, 277 (1927); *accord*, Spackman v. Parsons Co., 147 Mont. 500, 414 P.2d 918 (1966).
80. Ramsbacher v. Hohman, 80 Mont. 480, 489, 261 P. 273, 277 (1927). Argument along these lines was made in Cox v. Stolworthy, 94 Idaho 683, 691, 496 P.2d 682, 690 (1972).

III. FEE-SHIFTING IN MONTANA

As the above discussion indicates, the Montana court is not a stranger to exercising equity power to re-allocate the burdens of attorneys' fees. The power has been recognized for at least seventy-five years.[81] The court has frequently exercised the power in the "common fund" situation,[82] but it often has shown signs that it recognizes or would be predisposed to recognize the substantial benefit,[83] bad faith,[84] and compensatory damages[85] concepts. The approach, however, has been cautious and the court has never comprehensively defined the extent of its equitable power. By and large, it has repeatedly asserted that "the general rule is that attorney fees are not recoverable by successful litigants either in law or equity, except where they are expressly provided by contract or statute."[86]

In 1978, the court confronted the issue of non-statutory awards of attorneys' fees on two occasions. In the first case, *Foy v. Anderson*,[87] the court indicated the existence of an inherent equity power in the courts to ameliorate the American rule. The equity power recognized appeared far broader than any previous decision would indicate. Although the second case considered, *Masonovich v. School Dist. No. 1*,[88] severely limited the *Foy* holding, the two cases still provide precedent for firmly establishing in Montana the expanded approach recognized in other jurisdictions.

A. *The 1978 Cases*

In *Foy*, the defendant's automobile collided with an automobile driven by Jo Ann Gilreath. Gilreath and one of her passengers, Darby Fox, brought actions for personal injury. The defendant, Anderson, then initiated a third-party declaratory judgment action against his insurer for refusing to defend. He joined Karen Eggan, another passenger of the Gilreath car, on the basis that she too had asserted a claim against him. The trial court, however, dismissed

81. *See* Forrester v. Boston and Mont. Cooper Co., 29 Mont. 397, 407, 74 P. 1088, 1092 (1904).

82. *See, e.g.*, Trustee v. Greenough, 105 U.S. 527, 533 (1881); State *ex rel.* Lewis and Clark County v. Dist. Court, 90 Mont. 213, 224, 330 P. 544, 548 (1931).

83. *See* Forrester v. Boston and Mont. Cooper Co., 29 Mont. 397, 74 P. 1088 (1904). *See also* section II(B), *supra*.

84. *See* Home Ins. Co. v. Pinski Bros., 160 Mont. 219, 500 P.2d 945 (1972). *See also* section II(D), *supra*.

85. *See* Smith v. Fergus County, 98 Mont. 377, 39 P.2d 193 (1934); Home Ins. Co. v. Pinski Bros., 160 Mont. 219, 500 P.2d 945 (1972). *See also* section II(E), *supra*.

86. Bitney v. School District No. 44, 167 Mont. 129, 137, 535 P.2d 1273, 1277 (1975); *accord*, McMahon v. Falls Mobile Home Center, ___ Mont. ___, 566 P.2d 75 (1977); Nikles v. Barnes, 153 Mont. 113, 545 P.2d 608 (1969); Kintner v. Harr, 146 Mont. 461, 408 P.2d 487 (1965); Roseneau Foods, Inc. v. Coleman, 140 Mont. 572, 374 P.2d 87 (1962).

87. ___ Mont. ___, 580 P.2d 114 (1978).

88. ___ Mont. ___, 582 P.2d 1234 (1978).

Eggan from the declaratory judgment action on the basis of her affidavit that she never had contemplated an action against Anderson.[89] The court also awarded Eggan $200 in attorney fees.

On appeal, the supreme court held that Eggan was not an indispensible party and that she did not have a claim against Anderson requiring her presence in the declaratory action.[90] They reasoned that Anderson was seeking to compel Eggan to bring a lawsuit against him and that this "violate[d] both the letter and the spirit of the law" which were not designed to "encourage or promote litigation."[91] Addressing the attorney fee award, the court acknowledged the general rule "that the prevailing party in an action is not entitled to an award of attorney fees either as cost of the action or as an element of damages."[92] However, they went on to say that "it must be remembered that the District Court has discretionary power in dismissing an action . . . [and] [t]he court *also* reserves the power to grant complete relief under its equity power."[93] The court's statement was "meant to establish no precedent, but [the question of relief] must be determined on a case by case basis."[94]

Applying the facts, the court reasoned that Anderson "forced [Eggan] through no fault on her part to incur attorney fees and costs."[95] If Eggan was not awarded fees, she would "not be made whole or returned to the same position" she held prior to the suit.[96]

Chief Justice Haswell dissented. He stated that the court's justification of making a prevailing party whole is equally "applicable to any defendant who sues, hires an attorney, and ultimately prevails."[97] He viewed the case as a "sharp break from existing law" and pondered why the court stated the case did not establish a precedent. Finally, he acknowledged that there were substantial arguments supporting awards to prevailing parties, but felt that this was "a matter of public policy to be resolved by the legislature."[98]

Two months after *Foy*, the court decided *Masonovich*, in which

89. At the hearing on the motion to dismiss, Anderson presented an affidavit from an insurance investigator indicating that Eggan's mother had told the investigator that they intended to join the lawsuit. ___ Mont. at ___, 580 P.2d at 115.

90. Arguably, Anderson may have been acting prudently in joining Eggan. The statute provides that no declaratory judgment "shall prejudice the right of persons not parties to the proceeding." MONTANA CODE ANNOTATED [hereinafter cited as MCA] § 27-26-103 (1978) (formerly codified at REVISED CODES OF MONTANA (1947) [hereinafter cited as R.C.M. 1947], § 93-8911).

91. ___ Mont. at ___, 580 P.2d at 116.

92. *Id.*

93. *Id.* (Emphasis added.)

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at ___, 580 P.2d at 117.

98. *Id.*

the prevailing party tested the broad rule handed down in *Foy*. The plaintiff successfully enjoined a teachers' strike in Butte and was awarded attorney fees of $1500 by the trial court. The supreme court opinion, written by the dissenter in *Foy*, held that the trial judge lacked the discretion to award the attorneys' fees.[99] The court ruled that the fees could not be allowed either as an item of costs or as an award of damages. The fees were not allowable as costs since the court had previously held that the items of costs listed in what is now Montana Code Annotated § 25-10-201 (1978),[100] defining recoverable costs, was exclusive, and the list omitted attorney fees.[101] Moreover, the fees were not recoverable as damages since "generally, there can be no recovery as damages of the expenses of . . . attorney fees unless authorized by statute or contract."[102]

The court next distinguished *Foy*. It stated that the *Foy* award was not "damages," but was solely an award of attorney fees."[103] It then set forth some distinctions between the two situations:

> This Court decided that due to the circumstances [in *Foy*], the third party defendant was entitled to have her attorney fees paid by the third party plaintiff, who had forced her to obtain an attorney. In the instant case the plaintiff's position is entirely different from the third party defendant's position in *Foy*.
>
> Here, plaintiff obtained an attorney to institute legal action. He did not obtain an attorney to help him defend against a claim against him as in *Foy*. Plaintiff freely chose to obtain the services of a private attorney to institute a suit against others. He was not forced to take part in a legal action, which happened to the third party defendant in *Foy*. *Foy* is distinguishable on this basis and is not controlling in this case.[104]

B. *Analysis*

Chief Justice Haswell's criticisms of *Foy* in his dissenting opinion and the limitations placed on that decision in *Masonovich* by and large appear to be merited. The *Foy* approach, which on its face endows a trial judge with vast discretion in awarding fees against the loser, is inconsistent with the general approach that recognizes only discrete categories of exceptions and is also inconsistent with the cautious approach historically taken by the Montana court. The

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99. ___ Mont. at ___, 582 P.2d at 1236.

100. Formerly codified at R.C.M. 1947, § 93-8618.

101. The opinion cited Roseneau Foods, Inc. v. Coleman, 140 Mont. 572, 374 P.2d 87 (1962).

102. ___ Mont. at ___, 582 P.2d at 1235, *citing* 25 C.J.S. *Damages* § 50 (1966).

103. *Id.*

104. *Id.* at ___, 582 P.2d at 1236.

absence of judically manageable limits allows the trial judge to act in a role closely approaching a legislative function.[105] This weakness in *Foy*, however, does not completely destroy its value as precedent.

It should first be noted that the *Masonovich* case continues to recognize that there are circumstances meriting the award of attorneys' fees to the prevailing party, although it clearly limits the trial judge's discretion to make such awards. The *Foy* and *Masonovich* cases provide authority for recognizing the exceptions adopted in sister states but not yet firmly established in Montana. The emphasis in *Foy* on the losing litigant's conduct as an equitable factor in fee-shifting reinforces the conclusion that the court did in fact recognize the bad faith concept in the previous case of *Home Insurance Co. v. Pinski*.[106] The continued recognition that strong equities can merit shifting the burden of fees may indicate that the court will be receptive to the private attorney general concept based on the public policy of encouraging societally important litigation.

The classification given the *Foy* award in the *Masonovich* opinion should also be noted. The court said the *Foy* award was neither a recoverable cost nor an item of damages. Rather, it indicated that attorneys' fees commanded a category of their own when awarded because of compelling equities.[107] This novel concept will allow the court to make future awards without violating the logic that attorney fees cannot be awarded as a litigation cost or damage absent contract or statutory provisions to the contrary.

Finally, the *Foy* ruling may hold the seeds of a new exception to the American rule, notwithstanding the limits placed on it by *Masonovich*. The award of attorney fees could be used to discourage unnecessary litigation. The *Foy* and *Masonovich* cases indicate two limitations on the doctrine. First, the trial judge would have to be able to determine that the losing party "violate[d] both the letter and spirit of the law," which was not designed to "encourage or promote litigation."[108] A finding that the loser acted in bad faith in bringing suit, however, would not be necessary. Second, the court would have to conclude that this conduct "forced [the opposing party] to take part in a legal action."[109] Further refinement of these

105. This was a major objection of the U.S. Supreme Court to recognition of the private attorney general concept in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975).

106. 160 Mont. 219, 500 P.2d 945 (1972). *See* discussion in text accompanying notes 58-60, *supra*.

107. *Masonovich*, ___ Mont. at ___, 582 P.2d at 1236.

108. *Foy*, ___ Mont. at ___, 580 P.2d at 116.

109. In *Masonovich*, the court stated that in *Foy* it had decided that due to the circumstances, the third-party defendant was entitled to have her attorney's fees paid by the third-party plaintiff, who had forced her to obtain an attorney. ___ Mont. at ___, 582 P.2d at 1236.

elements will have to await common law development on a case-by-case basis.[110]

Molding an exception to deter unnecessary litigation would have an impact in situations far different from *Foy v. Anderson*. The doctrine would discourage nuisance suits where actual bad faith in bringing the action is difficult to prove. Under the American rule, it is possible for a plaintiff to file a suit knowing that the potential investigation costs and the accompanying attorneys' fees give the case a settlement value regardless of the merits. Medical malpractice suits seem particularly susceptible to this tactic. Although other factors may prevent total elimination of this unjustified tactic, the threat that the loser may be taxed with his opponent's attorneys' fees would at least discourage its use.[111]

The bad faith concept is, in part, applicable to the problem of misuse of the courts, but the requirement that factual bad faith be proved prevents it from being a meaningful deterrent. The recent Montana decisions could provide a foundation for an expanded approach if judicially manageable limits can be fashioned.

IV. CONCLUSION

American courts in general have shown a continuing willingness to experiment with equitable methods of abrogating the harshness of the American rule regarding payment of attorney fees. The common fund doctrine has been expanded by most courts to include the substantial benefit theory, and has been extended by some courts to the depth of its logical limits. The bad faith concept is recognized throughout the federal system and is gaining recognition in the states. Some courts that have faced the issue have concluded that attorneys' fees incurred prior to litigation can be considered a legitimate item of compensatory damages, and a growing number of courts have recognized fees as an element of punitive damages. Furthermore, the development of the "private attorney general" theory within the last decade evidences a willingness by some courts to use attorney fees as a method of furthering social policy.

Although its approach has often been guarded, the Montana Supreme Court also recognizes an equitable power to redistribute the costs of attorneys' fees in appropriate cases. Recent decisions raise the possibility that the court will pursue the broader approach

110. In *Foy*, the court announced that its decision was "meant to establish no precedent, but must be determined on a case by case basis." ___ Mont. at ___, 580 P.2d at 116-17.

111. *See* Kuezel, *The Attorney Fee: Why Not a Cost of Litigation?* 49 IOWA L. REV. 75, 78-80 (1963).

taken by some sister states. The cases may even indicate a willingness to go beyond the limits imposed elsewhere.